Koay Teng Soon & Anor v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO J–05–23 OF 1997
LAMIN PCA, HAIDAR JCA AND MOHD NOOR AHMAD J
26 JANUARY 2000

Criminal Procedure *— Sentencing — Principles of sentencing — Accused charged under s 304 (second limb) of Penal Code read with s 34 for causing death — Accused were young and had no previous convictions — Victim died of serious injuries to the head — Balance between public interest and interest of accused — Whether warranted custodial sentence and whether court should be lenient*

The appellants were originally charged under s 302 of the Penal Code (FMS Cap 45) read with s 34 for causing the death of one Liew Chin Lin. At the trial, the prosecution amended the charge to s 304 (first limb) read with s 34 where the appellants pleaded guilty and were sentenced to 12 years imprisonment each with effect from the date of their arrest. The appellants appealed against the sentence. At the appeal, as it was conceded that the facts of their case disclosed an offence under s 304 (second limb) read with s 34, the Court of Appeal substituted the conviction accordingly. The appellants asked for a lenient sentence because of the young age of the appellants who were 22 and 21 years old respectively and were 18 and 17 years old respectively when the offence was committed. The appellants had been in custody since their arrest and had no previous convictions. The respondent however highlighted the serious injuries inflicted on the deceased that resulted in death and that the most serious injuries were to the head.

Held, sentencing the appellants to nine years imprisonment:

When a court considers sentencing, public interest should be balanced with the interest of the appellants. In the present case, the public interest far outweighed the mitigating factors put forward for the appellants. Given the facts and the serious injuries inflicted that resulted in the death of the victim, the appropriate sentence would be a custodial sentence of nine years imprisonment on each of the appellants with effect from their date of arrest (see p 132F–H); *PP v Loo Choon Fatt* [1976] 2 MLJ 256 followed.

[Bahasa Malaysia summary

Perayu-perayu asalnya dituduh di bawah s 302 Kanun Keseksaan (FMS Bab 45) dibaca bersama s 34 kerana menyebabkan kematian seorang bernama Liew Chin Lin. Di perbicaraan, pihak pendakwa telah meminda pertuduhan tersebut kepada s 304 (cabang pertama) dibaca bersama s 34 di mana perayu-perayu telah membuat pengakuan bersalah dan telah dihukum penjara selama 12 tahun setiap seorang mula berkuat kuasa pada tarikh tangkapan mereka. Perayu-perayu telah membuat rayuan terhadap hukuman tersebut. Dalam rayuan tersebut, telah diakui bahawa fakta-fakta kes mereka

telah memperlihatkan satu kesalahan di bawah s 304 (cabang kedua) dibaca bersama s 34. Oleh itu, Mahkamah Rayuan telah menggantikan sabitan tersebut sewajarnya. Perayu-perayu telah memohon satu hukuman yang ringan kerana umur mereka yang masih muda iaitu 22 dan 21 tahun masing-masingnya dan, semasa kesalahan tersebut dilakukan, mereka masing-masing berumur 18 dan 17 tahun. Perayu-perayu adalah di bawah pengawasan sejak tangkapan mereka dan tiada sabitan sebelum ini. Responden bagaimana pun menekankan keseriusan kecederaan yang dialami si mati yang telah mengakibatkan kematian dan bahawa kecederaan yang paling serius adalah pada kepala.

Diputuskan, menjatuhkan hukuman penjara selama sembilan tahun ke atas perayu-perayu:

Apabila mahkamah membuat pertimbangan semasa menjatuhkan hukuman, kepentingan awam hendaklah diimbangi dengan kepentingan perayu-perayu. Di dalam kes ini, kepentingan awam lebih mengatasi faktor-faktor mitigasi yang dikemukakan untuk perayu-perayu. Setelah mempertimbangkan fakta-fakta dan keseriusan kecederaan yang telah mengakibatkan kematian mangsa tersebut, hukuman yang sewajarnya adalah hukuman tahanan penjara selama sembilan tahun setiap seorang daripada perayu-perayu tersebut yang mula berkuat kuasa daripada tarikh tangkapan mereka (lihat ms 132F–H); *PP v Loo Choon Fatt* [1976] 2 MLJ 256 diikut.]

Notes

For cases on principles of sentencing, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2904–2971.

Cases referred to

PP v Loo Choon Fatt [1976] 2 MLJ 256 (folld)
Tan Bok Yeng v PP [1972] 1 MLJ 214 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 293
Penal Code (FMS Cap 45) ss 34, 302, 304

Appeal from: Criminal Trial No 45–7 of 1995 (High Court, Johor Bahru)

RK Menon (*RK Menon & Co*) for the appellants.
Zauyah Bee bte Loth Khan (Deputy Public Prosecutor) for the respondent.

Haidar JCA (delivering judgment of the court): The appellants were originally charged in the High Court, Johor Bahru for causing the death of Liew Chin Lin on 15 February 1995 at about 1.15 pm in Kg Senai Subur, Tasek Utara, District of Johor Bahru, an offence under s 302 of the Penal Code (FMS Cap 45) read with s 34 of the same Code.

Before the commencement of the trial, the prosecution tendered an amended charge under s 304 (first limb) of the Penal Code read with s 34. The appellants pleaded guilty to the amended charge. After the facts were read out and explained to them, both of them admitted the facts as correct. The learned judge after considering the mitigating factors put forward on their behalf by their counsel, sentenced each of them to 12 years imprisonment with effect from their date of arrest, that is, 16 February 1995.

The appellants, being not satisfied with the sentence imposed, appealed to us in respect of the sentence only.

In the appeal before us, the deputy public prosecutor with the agreement of counsel for the appellants conceded that the facts disclosed an offence under s 304 (second limb) of the Penal Code read with s 34. We accordingly substituted the conviction to one under s 304 (second limb) of the Penal Code read with s 34.

Counsel for the appellants submitted that as at the date of the hearing of the appeal before us, the first appellant was 22 years old and the second appellant was 21 years old. However, at the time of the commission of the offence, the first appellant was 18 years old and the second appellant was 17 years old (see p 30 of the appeal record). Counsel for the appellants urged upon us to consider the ages of the appellants who are considered to be young at the time the offence was committed.

Quite apart from the age factor, it was submitted that the appellants had been in custody since the date of the arrest, ie 16 February 1995. Both of them had no previous convictions.

In the circumstances, counsel for the appellants prayed for leniency on behalf of the appellants.

The learned deputy public prosecutor brought to our attention the serious injuries inflicted on the deceased that resulted in his death. The injuries are stated at pp 46 to 50 of the appeal record. According to the doctor, who conducted the post-mortem on the deceased, the most serious injuries were to the head which resulted in his death.

Having considered the mitigating factors put forward by the appellants' counsel and to what the learned deputy public prosecutor submitted, the appropriate sentence in our view, should be a custodial sentence. We then next have to consider the period of imprisonment that should be imposed. The maximum punishment under s 304 (second limb) of the Penal Code is ten years imprisonment, but we must in considering the sentence to be imposed take into account the public interest element and not merely the interests of the appellants even though they might be of young age at the time of the commission of the offence. In any event, they do not come within the meaning of youthful offenders under s 293 of the Criminal Procedure Code (FMS Cap 6) as they were above the age of sixteen years.

Sharma J in *Tan Bok Yeng v PP* [1972] 1 MLJ 214 in dealing with the sentence in respect of an offence of robbery involving one of the accused whose age was 20 years, stated at p 215B–E:

> The second accused was 20 years of age while the appellant was 25 years at the date of the commission of the crime. I am quite aware that the law does

> provide for a lesser sentence or no sentence at all imposed upon persons of young age. There has, however, emerged in recent years in our society certain species of crimes which the alacrity of mind and body, the dare, dash and defiance of the youth alone is capable of performing and producing. Law cannot, in my view, remain merely a static and a meaninglessly passive, if ornamental and an orthodox instrument of justice, ineffective in its results and application. The social needs of the times have to be met and effectively met. It is not merely the correction of the offender which is the prime object of the punishment. The considerations of public interest have also to be borne in mind. In certain types of offences a sentence has got to be deterrent so that others who are like-minded may be restrained from becoming a menace to society.

In the appeal before us, the offence is more serious as it involves the death of a student.

The learned judge in imposing the sentence of imprisonment of 12 years on each appellant under the first limb of s 304 of the Penal Code took into consideration of what the learned deputy public prosecutor referred to 'gejala sosial yang melanda remaja pada ketika itu dan sekarang. Salah satu dari gejala tersebut, telah menyebabkan satu kejadian pembunuhan di Sekolah Datuk Abdul Rahman Yassin baru-baru ini.' He went on to say: 'Si mati dalam kes di hadapan saya adalah seorang penuntut di Tingkatan V di Sekolah Menengah Tasek Utara, Johor Bahru. Dengan itu, meskipun umur kedua-dua tertuduh berkenaan masih muda ketika melakukan kesalahan tersebut, mengikut mahkamah bahawa kepentingan awam ('public interest') hendaklah dipertahankan.' On the question of public interest, we would respectfully agree with what Hashim Yeop Sani J (as he then was) said in *PP v Loo Choon Fatt* [1976] 2 MLJ 256 at p 258A–C:

> ... A convicted person will also normally bring up problems of family hardship and the other usual problems of living. In such a situation the courts might perhaps find it difficult to decide as to what sentence should be imposed so that the convicted person may not be further burdened with additional hardship. This in my view is a wrong approach. The correct approach is to strike a balance, as far as possible, between the interests of the public and the interests of the accused. Lord Goddard LCJ in *Rex v Grondkowski* [1946] 1 All ER 560, at p 561, offered some good advice when he said:
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> > 'The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interest of the prisoners'.

In our view, the public interest far outweighed the mitigating factors put forward for the appellants given the facts and the serious injuries inflicted that resulted in the death of Liew Chin Lin and the appropriate sentence would be nine years imprisonment on each of the appellants but the sentence to take effect from the date of arrest, that is, 16 February 1995 and we so ordered.

Order accordingly.

Reported by Chin En Tek